

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ERNESTINO ORTEGA OROZCO**

Claimant

VS.

**TYSON FRESH MEATS, INC.**

Self-Insured Respondent

Docket No. 1,064,025

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the March 13, 2013, preliminary hearing Order for Compensation entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Bruce R. Levine, of Kansas City, Missouri, appeared for the self-insured respondent.

The ALJ found that claimant met with personal injury by accident that arose out of and in the course of his employment on November 20, 2012, based on the causation opinion of Dr. Julio Jimenez, a chiropractor. The ALJ granted claimant's request for medical treatment to the right hip and temporary total disability benefits beginning January 4, 2013, and continuing until further order, claimant is found to be at maximum medical improvement or claimant is returned to his regular work, whichever comes first. Respondent's request for a credit for Social Security retirement benefits being received by claimant was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 11, 2013, Preliminary Hearing and the exhibits, and the deposition of Ernestino Ortega Orozco taken March 7, 2013, and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Respondent contends claimant failed his burden of proving he sustained a compensable injury. Respondent argues that claimant's activity of walking down stairs is an activity of daily living and exposed claimant to no greater risk of injury than walking down stairs at his own home. Respondent asserts there is a lack of credible evidence from claimant as to how the accident occurred, as well as a lack of credible medical evidence to support causation. Respondent also argues that claimant is not entitled to temporary

total disability benefits under the current statute because he refused accommodated work and started using a cane on his own, without a recommendation from a doctor, thus making him unable to work at respondent.

Claimant asserts the Order of Compensation entered by the ALJ is supported by the record and should be affirmed.

The issues for the Board's review are:

1. Did claimant sustain a personal injury by accident that arose out of and in the course of his employment on or about November 20, 2012?
2. Was Dr. Julio Jimenez' opinion concerning causation and prevailing factor credible medical evidence?
3. Did claimant preclude his entitlement to temporary total disability benefits by using a cane without a doctor's suggestion or prescription, thereby making him unable to work at respondent?

#### **FINDINGS OF FACT**

Claimant began working for respondent in October 2012 in the shipping department. He worked the 11 p.m. to 7 a.m. shift. His job required him to stand in one spot and twist at the waist to pick up boxes of meat and stack the boxes onto a pallet. The boxes were at waist level and weighed from 77 to 99 pounds.

On November 20, 2012, claimant walked from the parking lot to his work station without any problem with his right hip. He worked about four hours into his shift when he began to feel pain in his upper right leg in the area of his thigh. He did not pay attention to the pain because he did not believe it was bad enough to report and because he thought it was pain from the cold. It is about 40 degrees in the area where claimant works. At some point, claimant went to the fourth floor to get a box because they were one box short for the next order. He felt pain as he went up to and returned from the fourth floor. After claimant returned with the box, he taped up a couple of boxes. Then he leaned against a belt for about 10 minutes. The pain was worse but still not bad enough to report. When claimant and his coworkers began to work on the next order, he moved away from the belt, and he could not move his leg. He then reported the problem to his supervisors and was taken to the nurses' station. There, an accident report was filled out, which claimant signed, which stated the injury occurred when claimant was walking down stairs. Claimant went home after getting some ice/hot lotion from the nurses' station and filling out the accident report. When he returned to work for the November 21 to 22 shift, he was put to work in the laundry room.

Respondent sent claimant to Dr. Terry Hunsberger, who first saw claimant on December 3, 2012. Claimant denied any specific trauma and said he had been wrapping pallets and developed pain in his right hip. Claimant said he was not sure the interpreter told the doctor exactly what he said. Dr. Hunsberger gave claimant restrictions and put him on light duty. On December 13, 2012, claimant went to work using a cane and was told he could not use a cane while working.<sup>1</sup> Claimant testified he asked Dr. Hunsberger if he could use a cane or walker at work and Dr. Hunsberger told him he could. There is no mention of a cane or walker in Dr. Hunsberger's medical records until January 16, 2013. At that time, Dr. Hunsberger reviewed an MRI taken of claimant's lumbar spine, which showed bulging discs at L1 through S1, as well a narrowing of the neural foramina. Dr. Hunsberger did not believe claimant needed a walker. Dr. Hunsberger's January 16, 2013, report stated:

I feel the prevailing factor is his age and previous medical condition. It is not related to his working, walking, while he is working at Tyson. He has possible triggering factors from his walking. . . . He does have significant medical degenerative changes that were pre-existing prior to his employment. These are secondary to the natural aging process and/or activities of daily living. I do feel that these are personal related and not related to his employment with Tyson.<sup>2</sup>

Claimant said since his pain was really bad, he went to see a chiropractor, Dr. Julio Jimenez. Dr. Jimenez' letter to claimant's attorney dated February 4, 2013, indicated he had seen claimant January 22, 24 and 29, 2013. Dr. Jimenez wrote:

The patient provided a history of an injury at work at Tysons on November 19, 2012. He works in shipping and was working on a conveyer line, when he twisted to place a box on the conveyer and felt a "twinge" and pain radiating down his right leg. . . .

. . . .

Based on the patient's exam and continued right leg pain, I ordered an MRI scan of the right hip . . . which demonstrated an "obliquely tranversing femoral neck fracture of the right hip resulting with varus deformity."

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<sup>1</sup> Claimant later explained that the "cane" he was using was actually the handle of one of respondent's brooms. Later claimant bought himself a regular cane, and at the time of the deposition he was using a walker.

<sup>2</sup> P.H. Trans., Cl. Ex. 1 at 5.

In my opinion, based on the history from the patient, my examinations, and the MRI, the “prevailing factor” in this patient’s right hip fracture/injury, and the need for medical treatment, was the work accident at Tysons on November 19, 2012.<sup>3</sup>

When claimant was asked by respondent’s attorney about the history he gave Dr. Jimenez of “twisting,” claimant said that he “got hurt, you know, from the boxes and then when [I] was walking when I get hurt more. When you throw the boxes is when that pain comes from more.”<sup>4</sup> Later, claimant said he was not sure if Dr. Jimenez wrote the history down correctly or if he understood what claimant said, even though claimant said Dr. Jimenez spoke Spanish. Dr. Jimenez recommended claimant be seen by Dr. Alok Shah.

Claimant filed an Application for Hearing with the Division of Workers Compensation on January 29, 2013, stating he sustained an accident on November 20, 2012, injuring his low back and all affected body parts while repetitively twisting in his regular job duties.

#### **PRINCIPLES OF LAW**

K.S.A. 2012 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

(d) “Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

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<sup>3</sup> Depo. of Ortega Orozco, Ex. 3 at 1-2.

<sup>4</sup> Depo. of Ortega Orozco at 70.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>6</sup>

### **ANALYSIS**

Claimant's work with respondent required him to lift boxes weighing more than 75 pounds and stack them on a pallet. This required claimant to twist while moving the boxes. During the course of this activity, claimant developed pain in his right hip. After the claimant finished this task, he walked and climbed stairs to get to another part of the building to retrieve more boxes. While going to get the boxes, claimant noticed that his pain was getting worse.

Dr. Jimenez provided a letter to claimant's attorney indicating that the described work activities were the prevailing factor for claimant's fractured hip and need for medical treatment. Dr. Shah also stated that the work activity was the prevailing factor causing the hairline fracture and need for medical treatment. However, the ALJ did not admit Dr. Shah's report into the record because the report was not provided to the respondent until the morning of the hearing. Dr. Shah's report was prepared only three days before the hearing.

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<sup>5</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>6</sup> K.S.A. 2012 Supp. 44-555c(k).

The Administrative Law Judge apparently found claimant to be a credible witness because she awarded benefits. In weighing the conflicting testimony and determining the respective credibility of the witnesses, the Board takes into consideration that the ALJ had the opportunity to personally observe the testimony. In this respect, he had the unique opportunity to observe their demeanor and assess their credibility. Therefore, the Board gives some deference to the findings and conclusions of the ALJ in this regard.

Giving due deference to the findings of the ALJ together with the testimony of the witnesses and the exhibits admitted into evidence, the Board finds that at this point in the proceedings the preponderance of the credible evidence supports the conclusion that claimant suffered an injury by accident arising out of his employment.

Respondent has also appealed the ALJ's acceptance of Dr. Jimenez' opinion and whether claimant is entitled to temporary total disability. The Board does not have jurisdiction to review either of these issues as they are within the authority of the ALJ and not appealable. K.S.A. 2012 Supp. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

K.S.A. 2012 Supp. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) whether the employee suffered an accident, repetitive trauma or resulting injury;
- (2) whether the injury arose out of and in the course of the employee's employment;
- (3) whether notice is given; and
- (4) whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested.

K.S.A. 2012 Supp. 44-534a(b) empowers the ALJ to conduct a full hearing on claims under the workers compensation act and make a preliminary award of medical compensation and temporary total disability compensation. The decision of an ALJ to admit or exclude evidence at a preliminary hearing is inherent in the power to conduct a full hearing on claims. As such, the decision to accept Dr. Jimenez' opinion is not appealable pursuant to K.S.A. 2012 Supp. 44-534a. The power of the ALJ to award

temporary total disability benefits is explicitly included in the statute and a decision to award at a preliminary hearing is not appealable.

### **CONCLUSIONS**

Based upon the foregoing, this board member finds:

1. Claimant suffered a compensable injury by accident arising out of and in the course of his employment on November 20, 2012; and
2. the Board does not have jurisdiction to hear issues relating to the admission of medical evidence or whether temporary total disability benefits are appropriate.

### **ORDER**

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated March 13, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2013.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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